"REPORTABLE"

* **HIGH COURT OF DELHI AT NEW DELHI**

\+ **OMP No. 485/2007 & IA No. 10045/2007**

Date of decision : December 10, 2007

M/s. BPL Limited ..... APPELLANT

! Through : Mr. Subart Birla, Advocate

Versus

$ M/s. Morgan Securities & Credits Pvt. Ltd. & Ors.
..... RESPONDENTS

^ Through : Mr. Joy Basu, Advocate
Mr. Madhurendra, Advocate for respondent No. 1.
Mr. Raj Kumar Subnani, Executive in person, for respondent No. 2.

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

(1) Whether reporters of local paper may be allowed to see the judgment?

(2) To be referred to the reporter or not? Yes

(3) Whether the judgment should be reported in the Digest ? Yes

ARUNA SURESH, J.

1. Present appeal has been filed by the appellant under Section 37 of the Arbitration and Conciliation Act (hereinafter referred to as 'Act') assailing the order of the arbitrator dated 12.7.2007 passed in the arbitration

proceedings between the parties whereby the appellant was restrained from selling or disposing off, encumbering any of its business or properties, investment in shares etc. Appellant and respondents No. 1 & 2 entered into agreements dated 27.12.2002 and 11.6.2003. The agreement dated 27.12.2002 contained an arbitration clause. A dispute arose inter se the parties and respondent No. 1 invoked the arbitration clause. It appointed respondent No. 3 as the arbitrator. After appointment when the matter was listed for preliminary hearing, arbitrator passed an interim order under Section 17 of the Act. Aggrieved by the said order, the present appeal has been preferred.

2. I have heard learned counsel for the parties and have also gone through the documents placed on record. Agreement dated 27.12.2002 contained an arbitration clause which reads as follows:

> "Any dispute or difference whatsoever between the parties arising out of or in connection with the present facility and for any other transaction/s between the parties shall be settled by Arbitration of a sole arbitrator appointed by Chairman of Morgan Securities and Credits Private Limited, who would also have right to appoint alternate Arbitrator in

place of the aforesaid Arbitrator, in case of his, death or being incapable or refusal to act or in the event of termination of his mandate for any reason. The arbitration proceedings shall be held at New Delhi. The power of the Chairman to appoint a Sole Arbitrator shall not be challenged by any party. Further, the parties agree that the arbitrator so appointed may be an employee and/or professional retainer and/or a person who has a relation or interest in the company. The parties agree not to ask for any adjournment except under extra-ordinary reasons."

3. Similarly, the agreement dated 11.6.2003 contained arbitration clause which is as follows:

> "Any dispute or difference whatsoever arising between the parties out of or in relation to the construction, meaning, scope, operation or effect of any transaction/s or the validity or the breach thereof arising out of or in connection with the present agreement and for any other transaction/s between the parties shall be settled by Arbitration of a sole Arbitrator appointed by Chairman of the Morgan Securities and Credits Pvt. Ltd., who would also have right to appoint alternate Arbitrator in place of the aforesaid Arbitrator, in case of his death or being incapable or refusal to act or in the event of termination of his mandate for any reason. The arbitration proceedings shall be held at New Delhi. The power of the Chairman to appoint a Sole

> Arbitrator shall not be challenged by either party. Further, the parties agree that the Arbitrator so appointed may be an employee and/or professional retainer and/or a person who has a relation or interest in the company. Both parties agree not to ask for any adjournment except under extra-ordinary reasons. The award given by the arbitrator shall be final and binding upon the parties."

4. When dispute arose between the parties, respondent No. 1 invoked arbitration clause and sent a letter dated 6.6.2007 calling upon the appellant to pay the amount as claimed within seven days and if the payment was not made in time, they would initiate legal action including invocation of arbitration clause. Vide letter dated 28.6.2007, respondent No. 1 invoked arbitration clause. Accordingly respondent No. 3 was appointed as an arbitrator vide letter dated 2.7.2007 issued by the Chairman of respondent No. 1.

5. On her appointment, the arbitrator sent a letter dated 3.7.2007 to the appellant as well as respondents No. 1 & 2, directing the parties to be present in person or through their authorized representatives/counsel for preliminary hearing on 12.7.2007 at 3.00 PM at B-57, Defence Colony, New Delhi. This letter was duly replied by the appellant on

6.7.2007 seeking adjournment of the preliminary hearing as the appellant was in the process of appointing a counsel to represent it before the arbitrator. However, the arbitrator proceeded with the preliminary hearing on 12.7.2007.

6. In the preliminary hearing, the arbitrator passed the following order:

> "Present: Mr. Joy Basu, Advocate along with Mr. V.P. Gupta authorized representative of the Claimant.
> Mr. Sanjeev Kumar, Company Secretary for both the respondents.
>
> Let the Claimant file Statement of Claim within two weeks, with copy to the respondent, who may file the reply to the Statement of Claim within two weeks thereafter. Both parties should file their documents along with their pleadings.
>
> Matter be listed for framing of issues on 21.08.2007 at 5.30 PM.
>
> Mr. Basu says that there is a negative covenant between parties. As per clause 6 of the said covenant respondents cannot directly or indirectly sell, dispose or encumber any of its undertaking or business nor any of its investment in shares etc. Mr. Basu says respondent should be restrained from transferring,

disposing or encumbering any of its undertaking, business or any property which it owns.

Mr. Sanjeev Kumar for the Respondent says that so far as Respondent No. 2, BPL Display Devices Ltd. is concerned matter is already before the BIFR. However, he submitted that Respondent No. 1 is not before the BIFR.

In view of clause 6 of the negative covenant, respondent is restrained from selling or disposing off, encumbering any of its business or properties, investment in shares etc. till the next date of hearing.

The fee of the Arbitrator is fixed at Rs. 15,000/- per sitting to be shared in equal proportion by the parties. At the initial stage parties shall pay an advance fee of three hearings. They will also pay lumpsum Misc. expenses of Rs. 6000/- to be shared in equal proportion. Fee and Misc. Expenses be paid before the next date of hearing."

7. Appellant has challenged this order on the grounds that the arbitrator conducted the proceedings dated 12.7.2007 and passed interim order without any application and without any claim petition being filed and without giving sufficient notice to the opposite parties. The arbitrator could not have passed an interim order only on the basis of an oral application and prayer without claim petition being there and appellant had no opportunity to verify the correctness

and validity of the claim. Appellant has also challenged the appointment of arbitrator and her jurisdiction to enter into reference amongst other objections. But these objections are not relevant for the purposes of consideration of the present appeal.

8. To appreciate the submissions of the parties it becomes necessary for me to reproduce Section 17 of the Act. Section 17 of the Act reads as follows:

> "17. Interim measures ordered by arbitral tribunal.--(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.
>
> (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."

9. Interpretation of Section 17 of the Act makes it clear that arbitrator has the power to pass an interim measure of protection as he may consider necessary in respect of subject matter of the dispute. The arbitrator can exercise powers under Section 17 on the request of a party.

10. Under Section 17 of the Act, the arbitrator has limited power and he cannot issue any direction which would go beyond the reference or the arbitration agreement. Interim order must relate to the protection of the subject matter of dispute and the order can be addressed only to a party to the arbitration and not to any other party. This section does not confer any power on the arbitral tribunal to enforce its order nor it provides for judicial enforcement of any such interim order passed by it. Arbitral tribunal cannot be considered as a court of law and its orders are not treated as judicial orders, though award passed by the arbitrator is enforceable in law. The jurisdiction of the arbitrator, therefore, is confined to the clauses contained in the agreement inter se the parties only.

11. In ***MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. - (2004) 9 SCC 619***, it was observed:

> "An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be subject-matter of reference."

12.It was further observed:

> "A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even under Section 17 of the 1996 Act, an interim order must relate to the protection of the subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned arbitrator, therefore, being coram non judice was wholly without jurisdiction and, thus, was a nullity."

13.In ***National Highways Authority of India (NHAI) v. China Coal Construction Group Corpn. - AIR 2006 Delhi 134***, the learned Single Judge of this Court followed the observations made in ***MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. (supra).***

14. In the present case, the arbitrator passed the interim order dated 12.7.2007 in a preliminary hearing and no claim or counter claim or reply had been filed and the arbitrator was not even aware of the nature of the parties' claims. This resulted into placing the parties in a situation which was beyond the subject of reference. The appellant was also not given any opportunity to contest the interim protection sought by the respondent No. 1 by way of oral submissions. Therefore, this order is without jurisdiction. Present petition was filed on 20.8.2007 i.e. after about one month of passing of interim order dated 12.7.2007. As pleaded by the appellant, respondent No. 1 had not filed any claims before the arbitrator till the filing of the appeal.

15. Respondent has placed on record a copy of the claim and the affidavit allegedly filed before the arbitrator. It is pertinent to point out that no date is mentioned either in the statement of claim or in the affidavit of Mr. P.K. Gupta, authorized signatory of the claimant. Therefore, it is not known as to when and if at all the statement of claim was filed by the respondent No. 1 before the arbitrator. Interim order was passed by the arbitrator in view of clause 6 of the agreement dated 27.12.2002. There is no such covenant in the agreement dated 11.6.2003.

16.In view of my discussion as above, appeal is allowed. Interim order dated 12.7.2007 passed by the arbitrator is hereby set aside.

December 10, 2007 **ARUNA SURESH**
jk **(JUDGE)**